IN THE

Supreme Court of the United States

October Term, 1943
No. 455.

THE REPUBLIC OF MEXICO and
THE STEAMSHIP "BAJA CALIFORNIA" by the Republic of Mexico, as Owner,

Petitioners,

vs.

R. B. HOFFMAN,

Respondent.

BRIEF OF RESPONDENT R. B. HOFFMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Opinions Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit has not yet been officially reported, but it has been printed in the advance sheets of the Federal Reporter (143 F. (2d) 854). It appears in the record commencing at page 240.

The opinion of the District Court is printed at 45 F. Supp. 519.

Jurisdictional Statement.

The judgment of the Circuit Court of Appeals was filed and entered June 30, 1944 [R. 252]. Petitioners filed a petition for rehearing, which was denied August 4, 1944 [R. 252].

The jurisdiction of the United States District Court was established by the physical presence of the respondent vessel in the district when process was first issued. The action was for a tort occurring on navigable waters and was clearly within the general admiralty jurisdiction.

The petitioners invoke the jurisdiction of this Court under Section 240 of the Judicial Code (U. S. C. Title 28, Section 347).

Statement of the Case.

The statement of the case in the petition is inadequate.

On October 19, 1941, the Mexican steamship CAMPECHE, in tow of the Mexican steamship BAJA CALIFORNIA, collided with the American gas screw steamer LOTTIE CARSON, then at anchor in the harbor of Mazatlan, Sinaloa, Mexico. As a result of the collision the LOTTIE CARSON was sunk and became a total loss. Respondent R. B. Hoffman, as owner of the LOTTIE CARSON, on his own behalf, on behalf of California Packing Corporation, mortgagee of the vessel, and on behalf of underwriters whose claims arose by subrogation [R. 192], filed on December 15, 1941, a libel in the United States District Court for the Southern District of California [R. 4]. The libel was *in rem* against the vessel and *in personam* against Compania Mexicana de Navegacion del Pacifico S. de R. L., the corporation operating the vessel both at the time of the collision and at the time of the libel. Pur-

suant to monition the BAJA CALIFORNIA was attached by the United States Marshal. Service of process was not effected upon the corporation respondent and the case proceeded against the vessel alone.

On December 24, 1941, the Mexican Consul at Los Angeles filed on behalf of the Ambassador for the Republic of Mexico a so-called "Suggestion" asserting that the BAJA CALIFORNIA was owned by the Republic of Mexico and in its possession [R. 20]. An answer to this document filed by respondent demanded proof of the ownership of the vessel and denied the allegations regarding possession and public service [R. 22].

On January 28, 1942, the United States Attorney for the Southern District of California, acting under the direction of the Attorney General of the United States, "as a matter of comity between the United States Government and the Government of Mexico for such consideration as this Court may deem necessary and proper" filed a Suggestion [R. 32] transmitting a Note of the Mexican Ambassador. The Note stated that the BAJA CALIFORNIA was owned by the Republic of Mexico. Libelant filed a Statement of His Position in response to this Suggestion and, *inter alia*, expressly submitted that the suggestion did not constitute a recognition and allowance by the State Department of the claim of sovereign immunity [R. 39]. An immediate hearing was then had on the issue of sovereign immunity [R. 45]. This hearing was based on a stipulation as to the facts [R. 25] and on documentary evidence, consisting principally of the contract under which the BAJA CALIFORNIA was being operated by the Mexican corporation [R. 48], certain articles of Mexican law dealing with "general lines of communication" [R.

83] and various certificates attesting the authority of the Mexican Ambassador and the registration of the steamer [R. 64-71]. This evidence shows, as we shall point out more particularly later, that the BAJA CALIFORNIA was owned by the Republic of Mexico but was neither in its possession nor its public service at the time of the collision or at the time of filing the libel. The evidence shows that she was in the possession, control and operation of a private corporation in a private freighting venture. The matter was submitted on written briefs [R. 127].

On February 13, 1942, District Judge Paul J. McCormick made an order holding that under the rule of *The Navemar* (303 U. S. 68), no ground had been shown for ousting the jurisdiction of the District Court, respectfully declining the Suggestion of the Republic of Mexico and ordering that the BAJA CALIFORNIA remain in the custody of the United States Marshal until the further order of the Court [R. 129].

The Republic of Mexico on March 30, 1942, filed an answer to the libel [R. 132] and two claims, one in the usual admiralty form [R. 142], the second a special claim asserting sovereign immunity [R. 143].

On April 8, 1942, a second "Suggestion" was filed by the United States Attorney [R. 147] transmitting a Note from the Mexican Ambassador, stating in effect that if the vessel should be released, the Mexican Government would meet any liability that might be declared "directly against it" should "the Courts decide that execution may be had against the vessel" [R. 160]. This Suggestion, like the first, was presented as a matter of comity "for such consideration as the Court may deem necessary and proper." The State Department this time accepted as true the state-

ment that the vessel is the property of the Mexican state, but did not "recognize or allow" anything further. This (the ownership), as Mr. Welles stated, was conceded by libelant at the January hearing [R. 149]. Libelant filed a reply to this Suggestion pointing out that if the vessel were released without a bond the District Court would have no jurisdiction to proceed further, and respectfully declining to accept the Mexican Government's proposal [R. 165]. Libelant renewed his offer to accept a bond without prejudice to the claim of sovereign immunity, but the Republic of Mexico rejected this offer [R. 177].

The case then went to trial on the merits, before District Judge Ben Harrison, May 6, May 13 and May 14, 1942. Witnesses were called and examined by both sides and documentary evidence was introduced. During the trial counsel for the Republic of Mexico stated in answer to an inquiry from the Court, that the Mexican Government had no additional evidence to submit on the issue of sovereign immunity [Stipulation, R. 225]. The Court filed a memorandum opinion [R. 185] holding the BAJA CALIFORNIA solely at fault for the collision and the loss of the LOTTIE CARSON. The Court held that in the absence of any additional evidence or a showing of extraordinary circumstances calling for a review of the question of sovereign immunity, the ruling of Judge McCormick on that subject was the law of the case [R. 189].

Findings of fact and conclusions of law were filed July 31, 1942, and the same day an interlocutory decree and order of reference was made [R. 201]. A reference was duly had to determine the amount of damage.

The District Court made a final decree on December 12, 1942 [R. 203], ordering a recovery in favor of libelant for the damages, interest and costs and directing a

sale of the vessel to satisfy the decree. Before the sale took place, however, the Republic of Mexico filed a petition for and obtained an allowance of an appeal, and obtained the release of the vessel by making a cash deposit in lieu of a supersedeas bond [R. 213].

Assignments of error, general in scope, were first filed; but later the appeal was made a limited appeal by stipulation and praecipe [R. 222] and by appellant's statement of points on which it intended to rely [R. 232]. The sole question presented to the Circuit Court of Appeals was the correctness of the order denying the Mexican Government's plea of sovereign immunity.

The Circuit Court of Appeals for the Ninth Circuit unanimously affirmed the District Court's decree, June 30, 1944 [R. 251]. There is a specially concurring opinion [R. 248] but no disagreement as to the result. All the judges concurred that the BAJA CALIFORNIA was a commercial vessel owned by, but not in the possession or public service of the Mexican government, and that she was not entitled to immunity. A petition for rehearing was filed and denied August 4, 1944 [R. 252].

The Republic of Mexico then filed its petition for certiorari in this Court.

The sole question presented by the limited appeal to the Circuit Court of Appeals was that of sovereign immunity. That is the sole question here, though the petition seeks improperly to drag in some other questions.

We have concurrent findings in both Courts below that the BAJA CALIFORNIA, both at the time of the collision and at the time of her seizure, was in the possession, operation and control, not of the Mexican Government but of a private corporation.

Summary of Argument.

I. The only question presented is whether the District Court and the Circuit Court of Appeals were right in denying sovereign immunity to a commercial vessel owned by but neither in the possession nor in the public service of a friendly foreign power at the time of her seizure under judicial process. The other issues suggested by the petition are not before this Court.

II. There is no conflict between the circuits on the question raised by this petition. Nor does the petition present any Federal question which has not been and should be decided by this Court. The sole question presented by this petition has been decided by this Court in *The Navemar*, 303 U. S. 68. It was there held that a government-owned commercial vessel can not claim immunity unless the vessel was in the possession of that government and operated by it in its service and interest.

III. Since the BAJA CALIFORNIA was neither in the possession nor the public service of the Republic of Mexico, the claim of sovereign immunity was properly denied, regardless of the fact that the Mexican Government had title to the vessel. Petitioner's authorities do not sustain the contention that title alone is sufficient to establish immunity of a foreign government-owned merchant vessel. The modern trend is to restrict, not enlarge, the immunity of commercial vessels.

ARGUMENT.

I.

The Only Question Presented Is Whether the District Court and the Circuit Court of Appeals Were Right in Denying Sovereign Immunity to a Commercial Vessel Owned by but Neither in the Possession Nor in the Public Service of a Friendly Foreign Power at the Time of Her Seizure Under Judicial Process. The Other Issues Suggested by the Petition Are Not Before This Court.

Petitioners enumerate a number of "Issues Presented by This Petition" (page 5) and urge still others in their Brief as grounds for granting a hearing.

Except for the issue of sovereign immunity, none of these are before this Court.

It is suggested that because the tort was committed by the BAJA CALIFORNIA in Mexican waters the United States District Court should have dismissed the action and required libelant to proceed in the Mexican courts. It is true that the right to claim "lack of jurisdiction" on this ground was reserved in the answer [R. 135] and that the point was urged in the second Note of the Mexican Ambassador [R. 161], but the contention was not argued at the trial, no error was assigned with respect thereto, and it was not mentioned on the appeal. The proposition cannot be noticed here. *Sonzinsky v. United States* (1937), 300 U. S. 506, 57 S. Ct. 554, 84 L. Ed. 772. Petitioners were well advised not to press this point. It had no merit. An American citizen may commence a libel in the courts of his own nation, in fact in the district of his own residence, for a tort committed on navigable waters, even though they be the territorial waters

of another state, when the offending vessel is within the district where he files his action. *Panama Railroad Co. v. Napier Shipping Co.* (1897), 166 U. S. 280, 17 S. Ct. 572, 41 L. Ed. 1004; *Galef v. U. S.* (E. D., S. C., 1928), 25 F. (2d) 134; *Royal Mail Steam Packet Co. v. Companhia de. Navegacao Lloyd de Brasileiro* (E. D., N. Y., 1928), 27 F. (2d) 1002.

It is intimated that the District Court should have dismissed the action on the basis of the Suggestion transmitting the note of the Secretary of State. But the claim of immunity was not "recognized and allowed" by the State Department. The Department merely passed the claim along to the Court for its judicial determination.* Petitioners' counsel never claimed otherwise, at the hearing on sovereign immunity, at the trial or on the appeal. When the State Department, *after the Court had denied immunity at the preliminary hearing,* accepted "as true the statement that the vessel is the property of the Mexican State," it merely affirmed a fact that everyone had admitted. It did not "recognize or allow" anything else. It did not direct or even recommend the release of the vessel. It is not claimed that the suggestion made by the Mexican Consul was anything more, at most, than a mere pleading. The question of sovereign immunity was properly treated throughout this case as a judicial, not a political question.

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*See *The Attualita* (C. C. A. 4th 1916) 238 Fed. 909; *The Katingo Hadjipatera* (S. D., N. Y. 1941) 1941 A. M. C. 581, 40 F. Supp. 546; affd. (C. C. A. 2d, 1941), 119 F. (2d) 1022, cert. den. 313 U. S. 593, 61 S. Ct. 1118, 85 L. Ed. 1547;

Cf. *The Navemar* (1938) 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 667.

Although denying that the claimed immunity ever existed, we argued on the appeal that the Republic of Mexico had waived any privilege of asserting sovereign immunity by making an unqualified general appearance and then proceeding to trial on the merits, instead of taking an appeal on the jurisdictional issues alone. The majority of the Circuit Court of Appeals holds there was no waiver, but that the District Court correctly decided that sovereign immunity did not exist. One Circuit Judge thought that the question of waiver should not be passed upon, inasmuch as all three Circuit Judges agreed that there was no right to sovereign immunity in the first place. The question of waiver is therefore not involved, unless this Court should conclude that the District Court and the Circuit Court of Appeals were wrong in denying sovereign immunity on the merits.

The argument on the "law of the case" (Item 7, page 7, of the Petition) does not present anything for review here. The Mexican Republic was not precluded from "again raising the issue" of sovereign immunity during the trial of the case. On the contrary, the trial court expressly invited the Mexican Republic to make any additional showing it had on that question. In the absence of such new evidence, Judge Harrison was right in declining to review the action of another District Judge in the same case, on the sovereign immunity question. *Commercial Union of South America v. Anglo-South American Bank* (C. C. A. 2, 1925), 10 F. (2d) 937. The Circuit Court of Appeals, however, elaborately reviewed the question on the merits and found against immunity.

The only question properly raised by the petition is whether a foreign government-owned merchant vessel is entitled to immunity from judicial process in a libel for a collision solely caused by her negligence, when she was neither in the possession nor the public service of the foreign government at the time of the collision or at the time of the seizure.

At neither time was the BAJA CALIFORNIA in the possession of the Republic of Mexico. The Circuit Court of Appeals agreed with the District Court's finding that "at the time of the collision * * * and at the time of filing the libel and service of the monition herein, she (the BAJA CALIFORNIA) was in the possession, operation and control of respondent Compania Mexicana de Navigacion, S. de R. L." [R. 244].

This Court has repeatedly held that concurrent findings of fact of two courts below will be accepted as conclusive unless plainly erroneous or unsupported by evidence. *Workman v. New York* (1900), 179 U. S. 552, 555, 21 S. Ct. 212, 45 L. Ed. 314; *The Wildcroft* (1906), 201 U. S. 378, 387, 26 S. Ct. 467, 50 L. Ed. 794; *Virginian R. Co. v. System Federation No. 40* (1937), 300 U. S. 515, 542, 57 S. Ct. 592, 81 L. Ed. 789.

The record supports the findings of the Courts below. The vessel had been delivered into the possession of a private corporation under a contract set out (in translation) on pages 48 to 63 of the Record. That contract was not a mere agency agreement. The corporation employed the crew at its own expense, assumed the burden of insuring the vessel, bore all the losses. The entire venture was at the risk and for the account of the corporation. If there were net profits from the business,

one-half thereof were to be paid the Mexican Republic. We refer to the opinion of the Circuit Court of Appeals for an analysis of the agreement [R. 244, 245]. The master's statement [R. 30] shows that the contract provisions were carried out. The private corporation received the ship's gross income, disbursed all the expenses, including the salaries of the officers and the wages of the crew, and completely managed the commercial operation of the vessel. The officers and crew were selected and employed by the corporation. They were not agents of the Republic and they did not hold the vessel in behalf of the Government. There is no escape from the finding of the District Court and of the Circuit Court of Appeals that the corporation and not the Republic of Mexico had possession of the vessel.

Petitioners do not contend otherwise. It is nowhere suggested that actual possession was in the Republic. It is asserted that the Government had "dominion and control" over the vessel. The fact is that the vessel had been delivered to a private corporation for commercial operation under a contract which gave the Republic no more dominion or control over the BAJA CALIFORNIA than it had over any other vessel in the Mexican merchant marine. It is true that in the event of default, the Republic reserved the right to retake possession of the vessel and rescind the agreement, but no such default, recapture or rescission had taken place here.

Petitioners also assert that the vessel was in the "public service of Mexico." This is demonstrably inaccurate. The only sense in which the vessel was in "the public service," and the only sense in which that term is used in the contract between the corporation and the Republic,

is that she was being operated as a common carrier serving the public generally. If such public service were sufficient to confer immunity, no vessel employed as a common carrier would be subject to the process of any court. "Public service" as used in the sovereign immunity cases means service for some national purpose, for the direct benefit of the government or country as a whole, as distinguished from service for the benefit of any individual or group of persons.*

A comparison of the contract under which the BAJA CALIFORNIA was being operated and the translation of the Mexican law of "the general lines of communication" [R. 83-110] shows that the corporation, in its operation of the BAJA CALIFORNIA, is treated in all substantial respects the same as are all other private corporations engaged in the merchant shipping business. Thus the contract provision for one-half the net profits [R. 50] is merely a compliance with Article 110 of the General Law [R. 100] providing for governmental "participation" in the revenue of all private shipping companies. The provisions of Article 8 of the contract that the routes shall be approved by the Government [R. 51] simply follow Article 200 of the General Law applicable to all the Mexican merchant marine [R. 104]. The requirement that naval, army or political officers should be transported free or at reduced rates [R. 52] is an exact paraphrase of the General Law applicable to all merchant ships. See Articles 57, 58, 102, 104 and 118 [R. 95, 96, 99, 100]. The provisions giving port facilities [R. 54, 55] are not basicly different from Articles 27 and 183 of

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*See *Berizzi Bros. Co. v. The Pesaro* (1926), 271 U. S. 562, 46 S. Ct. 611, 70 L. Ed. 1088; *The Exmal* (D. Mass. 1941) 40 F. Supp. 258.

the General Law [R. 92, 102]. The "sovereign control" of the Mexican Government over the services provided in the contract is a mere restatement of the General Law applicable to the termination of all concessions and contracts and the revocation of permits [R. 93]. The alleged power to replace the management relates only to a situation when the corporation might be in default. And even then, in most cases, there must be a hearing before the contract can be terminated [R. 60]. Unless the corporation breached the agreement, the Republic had no authority to dispossess the corporation for five years. [R. 60.]

The master's summary of the ship's operations for a period of two months from the time of the collision to the time of the seizure under process herein, which has been admitted as true for all purposes by the Republic of Mexico [R. 111], is not the story of a ship in governmental service. It is the story of a typical tramp merchant ship engaged in coastal and foreign trade, carrying, with a few inconsequential exceptions, private cargo at the regular rates and private passengers at full fare. [R. 28-30.] The corporation was simply engaged in the transportation of passengers and cargo for hire and the BAJA CALIFORNIA was no more "in the public service" of the Republic of Mexico than is any other vessel in that nation's merchant fleet.

The BAJA CALIFORNIA was not in the possession of the Republic of Mexico. She was not in the public service of the Republic of Mexico. The factual basis of her claim of sovereign immunity is narrowed down to *title* alone. This, under settled law, including the decisions of this Court, is not a sufficient reason for requiring the Court to withhold its normal jurisdiction.

II.

There Is No Conflict Between the Circuits on the Question Raised by This Petition. Nor Does the Petition Present Any Federal Question Which Has Not Been and Should Be Decided by This Court. The Sole Question Presented by the Petition Has Been Decided by This Court in The Navemar, 303 U. S. 68. Following the General Current of American Law, It Was There Held That a Government-Owned Commercial Vessel Can Not Claim Immunity Unless the Vessel Was in the Possession of That Government and Operated by It in Its Service and Interest.

The *indispensable* requisites and the *only* requisites for a successful claim of sovereign immunity are that the vessel be in the *possession* of the foreign sovereign and employed in its *public service*. Without them government ownership is of no avail. With them the ownership of the vessel need not be in the government.

Berizzi Bros. Co. v. The Pesaro (1926) 271 U. S. 562, 46 S. Ct. 611, 70 L. Ed. 1088, held that a ship owned and possessed by a foreign government and operated by it in the service and interest of the whole nation, as distinguished from any individual member, was immune from arrest even though it was being operated in the carriage of merchandise for hire.

In *The Navemar* (1938) 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 667, this Court held that a vessel owned by, but *not* in the possession or public service of a foreign government was not entitled to immunity. The NAVEMAR was libeled by a private company under a claim of

ownership. It was asserted that the crew unlawfully deprived libelant of the possession of the vessel. The Spanish (Loyalist) Government claimed that the vessel was immune from process, in that title had been taken by the Government as the result of a decree of expropriation published in Spain while the NAVEMAR was at Buenos Aires. The District Court held that the Spanish Government could not bring itself within the rule of *Berizzi Bros. Co. v. The Pesaro, supra*, unless it could "show not merely that the vessel was the *property* of the Republic of Spain but also that it was *possessed* by that government and was *operated by it in its service and interest*. Otherwise immunity cannot be successfully urged to protect a ship, engaging in the carriage of merchandise for hire, from seizure by judicial process." (17 F. Supp. at 650.) At a second hearing before the District Court it was held that "constructive possession" flowing from ownership is not the equivalent of physical possession necessary to confer immunity (18 F. Supp. at 157). The District Court was reversed by the Circuit Court of Appeals on the grounds that the allegations of possession and public service contained in the Ambassador's "Suggestion" were conclusive on the Court, and that in any event the Spanish Government had "constructive possession" which was sufficient as a basis for sovereign immunity.

This Court reversed the Circuit Court on both grounds and upheld the District Court. In a unanimous decision it held that the allegations in the Ambassador's Suggestion were not conclusive on the Court. It held that

immunity was properly denied because the Spanish Government did not prove its claim that the NAVEMAR had been in the *possession* of the Spanish Government. Nor did it support its contention that the vessel was in fact employed in public service. That case, then, is authority for the proposition that a vessel owned by, but not in the actual possession and the public service of, a foreign government is not entitled to immunity.

As to the necessity of *actual possession*, this Court followed the majority rule established by the cases which it cited with approval: *The Davis* (1870) 77 U. S. (10 Wall. 15, 19 L. Ed. 875 (salvage lien enforcible against property belonging to, but not in the possession of the government); *Long v. The Tampico* (S. D., N. Y. 1883) 16 Fed. 491 (libel for salvage properly brought against vessel intended for the Mexican Government as a revenue cutter where the vessel was not yet in the possession or public service of the Mexican Government); *The Attualita* (C. C. A. 4, 1916) 238 Fed. 909 (vessel requisitioned and in the service of Italian Government not entitled to immunity where she was operated by private owners who paid the crew and all other expenses of the ship); *The Carlo Poma* (C. C. A. 2, 1919) 259 Fed. 369, 370 (reaffirming the principle that the immunity of property of a sovereign depends not merely upon the ownership, but also upon actual possession by the sovereign of the property at the time process is served).

THE NAVEMAR case did not announce any novel doctrine. The insistence on proof of actual possession as

a prerequisite to immunity followed the general current of American Law.*

The decisions of the courts since THE NAVEMAR have adhered to its rule.**

There is no dissent in any American case from the proposition that title alone without actual possession is insufficient to confer immunity.

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*See, in addition to the cases referred to in *The Navemar* itself: *Maru Nav. Co. v. Societa Commerciale Italiana Di Navigation* (D. Md., 1921) 271 Fed. 97; *The Beaverton* (S. D., N. Y. 1919) 273 Fed. 539; *The Johnson Lighterage Co. No. 24* (D. N. J. 1916) 231 Fed. 365; and compare. *United States of Mexico v. Rask* (1931) 118 Cal. App. 21, 4 P. (2d) 981 (Sup. Ct. hrg. den. 1931), where the Mexican Government was denied immunity in a claim and delivery action from an asserted lien by the defendant on the ground that the Republic did not have possession of the boat.

The intimation in the District Court case of *The Roseric*, (D. C., N. J. 1918) 254 Fed. 154, that the appropriation by a government of a vessel and its devotion to public service might be sufficient to confer immunity even without exclusive possession cannot now be taken to be a correct expression of the law, if it ever was.

**_The Katingo Hadjipatera_ (S. D., N. Y., 1941), 1941 A. M. C. 581, 40 F. Supp. 546, affd. (C. C. A. 2d, 1941) 119 F. (2d) 1022, cert. den. 313 U. S. 593, 61 Ct. 1118, 85 L. Ed. 1547, (Greek Government not entitled to claim immunity for a vessel it had requisitioned where physical possession of the vessel had not been taken prior to the filing of the libel); *The Uxmal* (D. Mass., 1941) 40 F. Supp. 258, (vessel owned by Mexican Government not entitled to immunity where she had been delivered to a cooperative association of producers of sisal, even though the Mexican Government contributed to the capital of the association and had reserved the right to repossess the vessel in the case of national emergency; the Court holding that ownership was not sufficient to confer immunity and that the vessel was not in the possession nor the public service of the Republic of Mexico).

III.

Since the Baja California Was Neither in the Possession Nor the Public Service of the Republic of Mexico, the Claim of Sovereign Immunity Was Properly Denied, Regardless of the Fact That the Mexican Government had Title to the Vessel. Petitioners' Authorities Do Not Sustain the Contention That Title Alone Is Sufficient to Establish Immunity of a Foreign Government-owned Merchant Vessel. The Modern Trend Is to Restrict, Not Enlarge, the Immunity of Commercial Vessels.

It is difficult to determine just what is petitioners' exact contention. They first state that the District Court erred in not accepting the Republic's position that title alone confers sovereign immunity on the vessel. This is not and never was the American law. Later in the Brief, the additional assertion is made that the vessel was dedicated to the public service of Mexico. We have seen that there is no factual basis for this claim. Petitioners do not and can not challenge the undisputed fact and the concurrent finding of the two courts below that the Mexican Government did not have *possession* of the vessel. Actual possession is an indispensable requisite for immunity. The very quotation from Benedict on Admiralty at page 21 of petitioners' Brief shows that the refusal of jurisdiction *in rem* is limited to cases where the seizure results in a *dispossession* of the sovereign. As the BAJA CALIFORNIA was neither in the possession nor the public service of Mexico, the decisions of the District Court and Circuit Court of Appeals denying sovereign immunity were correct.

The cases cited by petitioners do not support any contrary view. We see no necessity for making a detailed

analysis of these decisions. Most of them are not in point. They fall mainly into the following categories:

(1) Cases depending upon, or announcing exceptions to, the general rule that the *domestic sovereign* is exempt from suit without its consent.

(2) Cases holding that property in the actual possession and control of the domestic government or of one of the states and employed in governmental service is immune from seizure.

(3) Cases holding that vessels in the actual possession of a foreign government and devoted to public use are immune from seizure.

(4) Cases announcing the principle that our courts will not ordinarily pass on the validity of acts done by another government within its own territory.

United States v. Allegheny County, Pennsylvania (1944) 322 U. S. 174, 88 L. Ed. 845, 64 S. Ct. 908, deals with the constitutional relation between state and federal governments with regard to the taxation of government property. It does not touch our question.

The Western Maid (1922) 257 U. S. 419, 42 S. Ct. 159, 66 L. Ed. 299, is adequately distinguished from our case in the Circuit Court of Appeals' opinion [R. 243]. *The Exchange* (1812) 7 Cranch (11 U. S.) 116, 3 L. Ed. 287, needs no other distinction than the fact that it concerned a warship in the possession of the French Government.

The English cases on sovereign immunity must be read with caution, as the English procedure *in rem* is not, like ours, basically an action against the *res* itself, but rather in substance an action against the owner coupled with

the right of arrest.* As there is always difficulty in a proceeding attempting directly to implead a foreign sovereign, the English cases have tended to be more sweeping in granting immunity than our own. But even in England the trend is away from immunity. *The Cristina* [1938] A. C. 485, 498, seriously shakes the authority of *The Parlement Belge*, L. R. 5 P. D. 197, and the other English cases referred to by petitioners. In *The Cristina*, Lord Macmillan said: "I confess that I should hesitate to lay down that it is part of the law of England that an ordinary trading vessel is immune from civil process in this realm by reason only of the fact that it is owned by a foreign state."

The alleged distinction between our case and *The Navemar* (Petitioners' Brief, p. 14), is untenable. Again we refer to the opinion of the Circuit Court of Appeals [R. 247].

The District Court did not hold, as petitioners suggest, (Brief, page 19) that the Republic had waived its immunity. It and the Circuit Court of Appeals held that the vessel never was immune.

It is not true that "changing governmental structures" require any enlargement of the immunity principle. The modern doctrine shows exactly the opposite tendency. The Brussels Convention of 1926 (see 6 Benedict on Admiralty, page 55) provides that government-owned commercial vessels, even those in the actual possession and operation of the government, may be arrested the same as privately owned vessels. This convention has been ratified by Mexico. While we do not contend it is binding in this case, since it has not yet been ratified by our own

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*See Robinson on Admiralty, page 363.

government, it shows that the Mexican Republic has agreed to a principle of non-immunity going far beyond the holding in our case. Our own government has, of course, waived immunity from suit both with respect to its ships employed as merchant vessels (Suits in Admiralty Act, 46 U. S. C. A. §741) and with respect to the operation of "public," *i.e.*, non-commercial vessels (Public Vessels Act, 46 U. S. C. A. §781). The text writers almost all agree that governments operating commercial vessels should not, in principle, be entitled to claim immunity with respect thereto. The injustice of relegating those injured by such vessels to a makeshift diplomatic remedy is widely recognized.*

Petitioners' alarm over the prospect of judicial seizures of lend-lease property is groundless. The decision in this case would not affect such property, at least if in the possession of agents of any Government and employed for public purposes. None of it, so far as we are aware, is in the possession of private individuals for purely commercial purposes.

The cure for the possible evil suggested by petitioners on page 20 of their Brief in connection with wide-spread state operation of commercial vessels would, we submit, be a statute limiting or repealing the doctrine of *Berizzi Bros. Co. v. The Pesaro*, and not extending the *Pesaro* decision beyond its present scope. The latter alternative would mean overruling *The Navemar*. In other words, make all commercially operated vessels subject to seizure, instead of granting immunity to them all, and, do it, if

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*See, for example, Robinson on Admiralty, p. 277; 50 Yale Law Journal, 1088; 1 Hyde, International Law, §257; 1 St. John's Law Review, 5; and see the remarks of Lord Maugham in *The Cristina* [1938] A. C. 485, 521.

that is what is wanted, by Congressional enactment or treaty.

That the Republic of Mexico is a friendly foreign power is conceded. But there is nothing prejudicial to amicable international relations in enforcing the law applicable in a litigation fairly conducted, in which the Republic was given every opportunity to present its defenses. The very fact that no appeal was taken from the District Court's decision on the merits shows that the Mexican Government was satisfied that the case was correctly decided. A good neighbor should not object to paying his lawful debts.

Conclusion.

The petition does not raise any question on which there is a conflict between the circuits.

It does not raise any Federal question which has not been, but should be, decided by this Court. *The Navemar* case has disposed of the only question here presented.

There is no reason for reviewing the decision of the Circuit Court of Appeals in this case. The Republic has had its day in court, contested the case throughout, and should not now complain if the court's judgment is enforced.

It is respectfully submitted that the petition should be denied.

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